In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1548

CARL DEAN WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Central District of California, petitioner, then a member of a prominent rock-and-roll singing group, was convicted of wilful failure to report for civilian work in lieu of induction, in violation of 50 U.S.C. App. 462(a) (Tr. 7-8, 213).[1] He was sentenced under the Youth Corrections Act (18 U.S.C.

[1] "Tr." refers to the trial transcript on file with the Clerk of this Court; "SSF" refers to petitioner's Selective Service file, also on file with the Clerk.

4209) and placed on three years' probation on condition that he perform civilian work during the first two years as an institutional helper at the Los Angeles County General Hospital, and pay a fine of $4,000. The court of appeals affirmed *per curiam* (436 F. 2d 972; Pet. App. A), and denied a timely petition for rehearing (Pet. App. C).

Petitioner was assigned a conscientious objector (I-O) classification by his local board on October 12, 1967 (SSF 104); on three separate occasions, he acknowledged his willingness to perform alternative civilian service of a "positive and constructive nature" (SSF 96, 101-102, 110). After receiving his I-O classification, petitioner and the board went through a lengthy process of attempting to reach an agreement on a civilian work assignment.

On November 28, 1967, the board sent a letter asking petitioner to check one of three jobs as his choice for a work assignment (SSF 118). In response, petitioner, while recognizing that the work offered was "good," insisted that he be allowed to work as a musician or music teacher (SSF 120). On January 12, 1968, he was informed that the work he requested was not deemed appropriate as work in lieu of induction (SSF 125). Pursuant to 32 C.F.R. 1660.20(c), he was invited to meet, on February 1, 1968, with a representative of the State Director and members of the local board in an effort to reach agreement on a civilian assignment (SSF 126). At petitioner's request (SSF 133), the meeting was postponed to March 7, 1968 (SSF 132), so that he could fulfill an entertainment contract with his musical group. On

March 7, the scheduled meeting took place, during which petitioner offered to perform, with his musical group, an undefined number of musical programs over the two-year period (SSF 140-142); the board rejected petitioner's alternative suggestion and recommended, instead, that he be assigned work as an institutional helper at the Los Angeles County General Hospital (SSF 143).

This recommendation was approved by the State Director, and petitioner was then ordered to report to his local board on May 23, 1968, in order to receive instructions to report to the civilian work assignment (SSF 150). Rather than reporting to the board, petitioner reported directly to the Los Angeles County General Hospital, announcing, "I'm here to determine what type of employment is available" (SSF 155). On being informed that he would be assigned the job of "male bedside attendant," petitioner asked if he could instead "set up musical therapy classes at the hospital" (SSF 155, 157, 158). This proposal was taken under advisement as a possible program to be developed in the future; however, in the interim petitioner would have to accept the existing assignment (SSF 160). After his initial discussions on May 23, petitioner failed to return to the hospital.

Thereafter, on November 12, 1968, the board cancelled its first order directing petitioner to report on May 23, 1968, and sent him a new order to report to the board on November 25, 1968, for instructions to proceed to the same civilian work assignment (SSF 179). On the scheduled date, he did not report to the board or to the work assignment (SSF 198; Tr. 148-

149). The instant indictment, trial and conviction followed, and the court of appeals affirmed *per curiam* (Pet. App. A).

1. Petitioner's offers to perform his civilian work in the capacity of an entertainer or musical teacher were properly rejected by his local board. The fact that he did not believe that the board's hospital assignment made the best use of his peculiar talents is not determinative. The assignment of civilian work is a matter to be determined by the local board. *Burton* v. *United States*, 402 F. 2d 536 (C.A. 9), certiorari denied, 393 U.S. 1089; *Mang* v. *United States*, 339 F. 2d 369 (C.A. 9). See *United States* v. *Lawson*, 337 F. 2d 800 (C.A. 3).

There can be little dispute that the job offered petitioner here was appropriate for him to perform in lieu of induction and contributed to the maintenance of the national health, safety and interest. 32 C.F.R. 1660.1. It was assigned only after the board had given full and careful consideration to petitioner's alternative suggestion that he be permitted to work for two years as a free-lance entertainer or musician (Tr. 74, 77). In rejecting this suggestion, the board determined that the "work" offered by petitioner did not contribute to the national health, safety and interest of the country (Tr. 79). Moreover, as noted by the court below (Pet. App. A 3), "[t]he lack of specificity in the suggested employment" was alone sufficient ground for the board's denial of the request (Tr. 166-168). Reliance by the board, instead, on the State Director's approved list of acceptable civilian employments, in assigning petitioner work at the

Los Angeles County General Hospital, was thus entirely appropriate. See *Burton* v. *United States*, *supra*.

2. Petitioner's contention that his conviction should be set aside on the ground that he had become a father several months after he had committed the offense, and thus was entitled to a fatherhood (III-A) deferment, is without merit. The local board was not informed by petitioner until June 16, 1969 that his wife, on March 11, 1969, had given birth to a child (SSF 254); this was approximately six and one-half months after he failed to report as ordered on November 25, 1968.[2] Whatever effect this circumstance might have on petitioner's present I-A classification,[3] it can have no bearing on his conviction for the earlier commission of acts constituting the crime of wilful refusal to obey an order to report for civilian work in lieu of induction. Cf. *Talcott* v. *Reed*, 217 F. 2d 360, 363 (C.A. 9); *United States* v. *Hulphers*, 421 F. 2d 1291 (C.A. 9); *Palmer* v. *United States*, 401 F. 2d 226 (C.A. 9); *Brown* v. *United States*, 409 F. 2d 1354 (C.A. 9).

3. Petitioner's remaining contentions are equally untenable. The questions concerning the constitutionality of the Military Selective Service Act, and of its

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[2] 32 C.F.R. 1622.30(c)(3) provided at the pertinent times that a fatherhood deferment was not available unless proof was provided prior to the mailing of the notice to report.

[3] While this fatherhood deferment has been terminated as of April 23, 1970 (Executive Order 11527, 35 F.R. 6572), it is still available to registrants submitting such a claim to their local boards prior to that date.

enforcement during the Vietnam conflict, have been consistently rejected by the courts. See, *e.g.*, *Selective Draft Law Cases*, 245 U.S. 366; *Lichter* v. *United States*, 334 U.S. 742; *United States* v. *Crocker*, 294 F. Supp. 776 (D.C. Minn. 1969), affirmed, 420 F. 2d 307 (C.A. 8), certiorari denied, 397 U.S. 1011; *United States* v. *Perrin*, 431 F. 2d 875 (C.A. 9). Nor is there any merit to petitioner's claim that the trial judge erred in instructing the jury. The proposed instructions proffered by petitioner were properly rejected since they attempted to present questions of law to the jury or were adequately covered by the court's other instructions. And the proposed instructions seeking to attack the board's I-O classification as arbitrary and capricious were plainly inappropriate since petitioner never challenged the validity of his classification at trial (Tr. 125-126).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1971.

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